UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

GRAINLAND COOPERATIVE

Employer

and

Case 33-RD-809
Stipulation

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO LOCAL 996

Union

and

JEREMY STONE

Petitioner

REPORT ON CHALLENGED BALLOTS

Procedural History

Following the filing of a petition on January 27, 2003[1] and pursuant to a Stipulated Election Agreement approved by the undersigned on February 14, an election by secret ballot was conducted on March 10, under my supervision in the following unit:

> All full time and regular part time production and maintenance employees including the office bookkeeper employed at the Employer's El Paso and Secor, Illinois facility; but excluding the office manager, professional employees, guards and supervisors as defined in the Act.

The Tally of Ballots, copies of which were furnished to each of the parties on the day of the election, shows the results of the election were as follows:

Approximate number of eligible voters	4
Number of void ballots	0
Votes cast for Union	2
Votes cast against participating labor organization	1
Valid votes counted	3
Challenged ballots	2
Valid votes counted plus challenged ballots	5

[1] All dates herein are 2003 unless otherwise stated.

Challenged ballots are sufficient to affect the results of the election. Timely objections were not filed.

Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations Series 8, as amended, the parties were given reasonable notice to present their positions and relevant evidence. I have considered the positions and evidence submitted and the issues raised by the challenged ballots.

THE CHALLENGED BALLOTS

David Allen

The ballot of David Allen was challenged by the Board agent conducting the election because his name did not appear on the voter eligibility list. The Employer contends that Mr. Allen is ineligible to vote because he was terminated for just cause on January 7, and therefore was not employed during the payroll period for eligibility ending February 8. On January 7, the Employer sent Mr. Allen a letter informing him of the decision to terminate his employment, with a copy to the Union. Allen's termination is not the subject of an unfair labor practice charge; however, Mr. Allen filed a charge with the Illinois Department of Human Rights on March 18 regarding his termination. The Union contends that Mr. Allen's ballot should be counted because his discharge was improper, violated the Americans With Disabilities Act, and the charge over that issue is currently under investigation. The Union contends that but for the Employer's illegal action, Mr. Allen would have been employed on the date of the election.

No grievance was filed over Mr. Allen's January 7 termination. Under the terms of Article XVI of the collective bargaining agreement, all grievances must be presented within five working days from the date the event occurs which gives rise to the grievance. On February 18, Allen signed a grievance seeking 80 hours of accrued vacation pay and .35 of 1% profit sharing.

On February 24, Allen signed a grievance alleging a violation of Article V, Seniority, of the contract and seeking wages and fringes from February 20 forward. On February 25, the Union sent the Employer a letter requesting that the Employer honor a doctor's release of February 20 and reinstate Allen immediately to his former position at the El Paso facility. Therefore, it appears that grievance was filed over the failure or refusal to reinstate Allen on or after February 20. However, the doctor's release and subsequent conduct all took place after the payroll period for eligibility had ended. Even if the Union prevails on that grievance, Allen would still not have been employed during the eligibility payroll period ending February 8. To be eligible to vote in a Board election, the employee must be in the appropriate unit on the established eligibility date and in employee status on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). The employee must be employed and working on the established eligibility date, unless absent for reasons of illness, vacation, temporary layoff status or military service. *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973)[2]. Therefore, arbitration of the above grievances would have no effect on Allen's voting eligibility.

As a general rule, a discharge is presumed to be for cause unless a charge has been filed and is pending concerning the discharge. In such a case, the employee votes under challenge. *Dura Steel Co.*, 111 NLRB 590 (1955). This same policy applies with respect to pending grievances. *Pacific Tile & Porcelain Co.* 137 NLRB 1358 (1962), and other litigation where reinstatement is possible. *Grand Lodge Int'l Association of Machinists*, 159 NLRB 137 (1966). The Board noted in *Curtis Industries*, 310 NLRB 1212 (1993) and reaffirmed in *Mono-Trade Co.*, 323 NLRB 298 (1997), that it would wait a reasonable period of time for completion of the litigation or arbitration where reinstatement is possible. However, the Illinois Department of

[2] Allen's discharge negates the eligibility normally accorded to an employee on sick leave. *Douglas Food Corp.*,

Human Rights has informed this office that it could take up to one year to initially process and investigate Mr. Allen's charge, and then, if it is found to have merit, it could take five to seven years to reach a final decision or resolution. Therefore, it cannot be found with any degree of certainty that Mr. Allen's charge will be resolved with reasonable promptness or within a reasonable period of time.

Accordingly, in the interest of prompt resolution of the question concerning representation, I recommend that the challenge to the ballot of David Allen be sustained. *Curtis Industries*, supra at 213.

Derek Holle

The ballot of Derek Holle was challenged by the Union on the basis that he is not in the bargaining unit. The Union contends that Mr. Holle is ineligible to vote. The Union contends that Holle has only worked at the El Paso facility sporadically and therefore does not have a community of interest with bargaining unit employees. The Employer contends that Holle has worked full-time at the El Paso facility since January 20 and therefore is an eligible voter.

The Employer operates three grain elevators at three different locations all within close proximity of each other. They are located in Eureka, El Paso and Secor, Illinois. Of the three facilities, two (El Paso and Secor) are included in the existing bargaining unit. There are two employees at El Paso, two at Secor, and seven at Eureka. Time recordation is by self-reporting where employees handwrite their hours of work on weekly time sheets. Those time sheets show only the hours worked and not the location of the work performed. The Employer has no time sheets, payroll records or other documents that show what location employees are assigned to work. The Employer states that because each location has certain work to do, the presence of

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330 NLRB 821, 840 (2000).

employees is evident from whether the work is done, e.g. available for grain intake or delivery, drying and storage of grain, etc. The Employer states that if the work is done, then the employees have obviously been working.

Derek Holle started working for the Employer in August 2002. He worked as a temporary part-time employee at the Eureka facility. The Employer contends that on January 20 he was promoted to and/or hired as a regular full-time probationary employee at El Paso to fill the vacancy created by the termination of unit employee David Allen. The Employer contends that Holle became a bargaining unit employee on January 20 and has worked continuously in that capacity ever since. The Employer adds that Holle completed his probationary period and became a regular full-time seniority employee on February 18.

The Employer has provided records which show the following. On January 20, Holle signed a Checkoff Authorization and Assignment form for dues and fees to be remitted to the Union. On January 22, the Employer notified the Union by letter that Holle had been brought in to fill the vacancy in the bargaining unit created by the departure of David Allen. With that letter, the Employer sent the Union Holle's completed Checkoff Authorization and Assignment form and a check in the amount of $350 for Holle's initiation fee. The Union issued a receipt for that payment on February 28. The Employer deducted $175 from Holle's paychecks on January 27 and February 3 for his initiation fee. The Employer has deducted $4.62 for union dues from Holle's weekly paychecks since February 3. On February 24, the Employer remitted a dues check to the Union on behalf of four named employees, including Holle, for the month of February. On February 25, Holle completed an Employee Application for health, dental, life and short term disability insurance coverage. On March 20, the Employer remitted a pension contribution check to the Union Pension Fund on behalf of four named employees, including

Holle, for the month of February. Holle's handwritten time sheets list him as working 40 or more hours per week for all pay periods ending since January 25.

The Employer contends that Holle has worked full-time at El Paso since January 20. Holle confirms that in a sworn affidavit. In his affidavit, Holle states that since becoming full-time he has worked 40 hours per week at the El Paso grain elevator, and that he does not work at any other elevator, but sometimes he might have to go to the Eureka or Secor elevator to pick up a needed tool or part.

The Union contends that Holle does not work at the El Paso facility on a regular basis. However, the Union has presented no witnesses or evidence to support its bare assertion. Such a speculative contention does not raise "substantial and material factual issues" requiring a hearing. See Section 102.69 (d) and (f) of the Board's Rules and Regulations.

In view of the above, it is evident that Mr. Holle was employed and performed work on a regular basis as a full-time employee within the appropriate unit during the payroll period for eligibility ending February 8 and on the election date[3]. Therefore, as he enjoys a sufficient community of interest with other full-time and regular part-time unit employees to be included in the same unit with them, Mr. Holle is eligible to vote.

Accordingly, I recommend that the challenge to the ballot of Derek Holle be overruled, and his ballot be counted.

CONCLUSIONS

On the basis of the investigation and for the reasons stated above, it is recommended that the challenge to the ballot of David Allen be sustained, the challenge to the ballot of Derek Holle

[3] The Board has held that an employees is eligible to vote if he was employed in the unit during the eligibility payroll period and on the date of the election. *Stockham Valve & Fittings, Inc.*, 222 NLRB 217, 219, Fn. 2 (1976).

be overruled, and the ballot of Derek Holle be opened and counted and an appropriate Revised Tally of Ballots be prepared and served upon the parties.[4]

DATED at Peoria, Illinois this 23rd day of April, 2003

/s/ Ralph R. Tremain
Ralph R. Tremain, Regional Director
National Labor Relations Board
Subregion Thirty-Three
300 Hamilton Square, Suite 200
Peoria, Illinois 61602-1248

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[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by May 7, 2003. Under the provisions of Section 102.69(g) of the Board's rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and challenged ballots and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or opposition hereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.